STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF COMMUNITY HEALTH, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 289177 Board of Veterinary Medicine Disciplinary Subcommittee
DOUGLAS LINK, DVM, Defendant-Appellant.	LC No. 2006-000325

Before: MURRAY, P.J., and SAAD and M.J. KELLY, JJ.

PER CURIAM.

Respondent, a licensed veterinarian, appeals a November 10, 2008 order of the Department of Community Health Board of Veterinary Medicine that placed him on probation for a period of six months and ordered that he complete continuing education in the area of recordkeeping and controlled substance regulations. The board's disciplinary subcommittee found that respondent violated the general standard of care and minimum level of competence for veterinarians by failing to maintain adequate medical records and failing to properly store and destroy controlled substances. For the reasons stated in this opinion, we affirm.

Respondent contends that the decision of the disciplinary subcommittee was not supported by competent, material and substantial evidence. The Department of Community Health and the Board of Veterinary Medicine regulate the practice of veterinary medicine under the Public Health Code. MCL 333.18801, *et seq.*, and the Administrative Procedures Act, MCL 24.201, *et seq.*; *Dep't of Consumer and Indus Servs v Hoffmann*, 230 Mich App 170, 178-179; 583 NW2d 260 (1998). The board's disciplinary subcommittee is responsible for deciding sanctions. MCL 333.18835, .16221, .16226. After an administrative hearing, the disciplinary subcommittee reviews the findings of fact and conclusions of law of the hearing officer, and "may revise the recommended findings of fact and conclusions of law as determined necessary by the disciplinary subcommittee." MCL 333.16237(3). The disciplinary subcommittee then determines whether a preponderance of the evidence supports the recommended findings of fact and conclusions of law, and may dismiss the complaint or impose an appropriate sanction. MCL 333.16237(4). A final decision of the disciplinary subcommittee may only be appealed to the Court of Appeals. MCL 333.16237(5). This Court, in turn, reviews challenges to the factual basis for a disciplinary subcommittee's final order to determine whether the final order is "'supported by competent, material and substantial evidence on the whole record.'" *Dep't of*

Community Health v Risch, 274 Mich App 365, 371-372; 733 NW2d 403 (2007), quoting Const 1963, art 6, § 28.

Here, the disciplinary subcommittee found that respondent violated his general duty of care, MCL 333.16221(a),[1] and failed to achieve a minimal standard of practice for a veterinarian, MCL 333.16221(b)(*i*),[2] for his failure to properly store and destroy controlled substances and to maintain adequate medical records. Respondent disputes that the evidence supports such findings.

Respondent challenges the subcommittee's finding that he failed to properly store medications. Respondent said that he received a large amount of medication in the fall and winter of 2001, including controlled substances, from another veterinarian, Dr. Schiff. Respondent explained that Schiff did not supply the medicine transfer forms he had promised, but he also acknowledged that he did not document receipt of the drugs in a logbook that he had maintained from the beginning of his practice. Respondent testified that he used a system whereby he reserved the bottom of his refrigerator for expired vaccines, and systematically stored current vaccines and medicines elsewhere in the refrigerator according to animal type. Respondent explained that he stored expired vaccines in the refrigerator because he did not want the drug company to refuse to exchange the vaccinations because he let them spoil in the heat. Respondent believed that the expired and current medicines were not "commingled" because

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[1] MCL 333.16221(a) provides as follows:

> A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully practice the health profession.

[2] MCL 333.16221(b)(*i*) provides as follows:

> The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exist:
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> (b) Personal disqualifications, consisting of . . .
>
> (*i*). Incompetence.

"Incompetence means a departure from, or failure to conform to, minimal standards of acceptable and prevailing practice for a health profession, whether or not actual injury to an individual occurs." MCL 333.16106(1).

they were at least a foot apart in the refrigerator. Respondent stated that he ensured he did not administer expired vaccines by purchasing small lots of single dose bottles where possible, and by affixing the sticker from the bottle onto the customer's invoice after administration. Respondent's former staff members, Cora Witkovsky and Emily Harper, confirmed that respondent utilized this system for handling expired vaccines.

Respondent's expert, Ed Liebler, D.V.M., testified that respondent's storage of the vaccines was not negligent or incompetent. Petitioner's expert, Joseph Kline, D.V.M., acknowledged that most clinics have some expired medicines commingled with current medicines. However, Kline opined that commingling expired and current medicines was a violation of the applicable standard of care, and probably a violation of the health code. Kline stated that respondent commingled these medicines because they were in the same refrigerator, and a danger existed that one could reach into the refrigerator and take an expired vaccine.

Clearly, evidence was presented on both sides of the issue. However, "'[s]ubstantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). Given respondent's admitted documentation gaps regarding obtaining the drugs from Schiff, the manner in which the drugs were stored with other drugs, and Kline's opinions on the applicable standard of care, the disciplinary subcommittee's finding that respondent improperly stored medication was supported by competent, material, and substantial evidence. *Risch*, 274 Mich App at 371-372.

Respondent also disputes the finding that he failed to properly destroy controlled substances. Respondent stated that as of summer 2002, he was not sure which medications Schiff wanted returned, which he wanted respondent to purchase, or which he wanted destroyed. Respondent said that the state inspector directed him to destroy the narcotics from Schiff that she did not confiscate, and he did destroy them before her next visit a few days later. Respondent argues that he should not be penalized for cooperating with the investigator and doing as he was told.

However, respondent did not document his possession of the drugs, or dispose of them until told to do so. Respondent also did not record the destruction of the controlled substances in his logbook or complete a DEA form supplied for drug destruction. Further, Kline stated that the DEA requires two witnesses to destroy drugs. Additionally, respondent failed to clarify with Schiff which drugs he wanted destroyed or kept for him, and which drugs he hoped respondent would purchase. If respondent had done this, then he could have at least destroyed those drugs that he knew he would not be acquiring. Thus, the finding of the disciplinary subcommittee, that respondent failed to properly destroy controlled substances, was supported by competent, material, and substantial evidence. *Risch*, 274 Mich App at 371-372.

Respondent also disputes the disciplinary subcommittee's finding that he failed to maintain adequate records regarding the treatment of animals named Blondie and Snickers. Respondent asserts that many of his records were irretrievably destroyed when his computer crashed and his back-up disks were corrupted. Both experts testified that computerized records were common and acceptable, and the loss of records from computer crashes and water or fire

damage did not breach the standard of care. However, the findings of the subcommittee involved records that could be reviewed.

Liebler believed that the standard of care for keeping medical records required the compilation of information for each occurrence and the precise status of the animal. Kline stated that the medical record should allow review of the course of treatment for a particular animal. Kline stated that medical records must be retrievable, reproducible, accurate, and leave a narrative reflecting the situation. Kline also stated that information in a medical record would include temperature, pulse, respiration, weight, owner's report of animal health, and the veterinarian's findings.

Respondent argues that the medical record for Blondie was not determined by the experts to violate a standard of care. However, Kline characterized the medical record for Blondie as poor practice, and probably negligence, but not incompetence. Kline stated that there was not enough information in the medical record to determine why Blondie died. Liebler acknowledged that the record would need to be amended if it were forwarded to another veterinarian. Liebler also stated that it would have been helpful to note the discoloration of Blondie's uterus in the record because it indicated a serious problem with the animal. Kline stated that it was unclear what the diagnosis of a fetal-pelvic mismatch referenced, and the record only indicated that Blondie had a labor that was not progressing favorably. Kline commented that the levels of dehydration and low blood oxygen indicated concern that Blondie was in shock, but there was no record of fluids administered intravenously. Kline stated that there was no record of monitoring Blondie during surgery for vital signs or blood loss. Kline said that the postoperative notes should have included the reason for, the method of administration, and the amount of steroid given. Kline discerned that the record indicated that respondent was trying to increase Blondie's respiration, but failed to note the rate. Kline believed that the postoperative notes did not reflect what should have been done, what was done, or what transpired. Respondent also testified that he did not record observations and monitoring during Blondie's surgery, and also did not document about the alleged large amount of oxytocin administered by the dog's owners that respondent felt contributed to the animal's death.

While respondent did keep some records with respect to Blondie, the disciplinary subcommittee's finding that respondent failed to maintain *adequate* medical records was supported by competent, material, and substantial evidence. *Risch*, 274 Mich App at 371-372. The above evidence shows significant gaps in the documentation of Blondie's treatment that, at the very least, hindered effective review of her treatment.

The evidence also supports the subcommittee's finding that respondent failed to maintain adequate medical records with respect to Snickers. *Risch*, 274 Mich App at 371-372. The record of the treatment of Snickers was a September 30, 2001 invoice that, according to Kline, indicated that respondent performed a C-section on Snickers and administered a penicillin injection. Kline stated that the invoice was not a medical record and failed to indicate the chief complaint, examination findings, pre-surgery treatment, any medications given, surgical results, and follow-up. Kline stated that if the invoice was the only record of Snicker's hospitalization and surgery, then the record was incompetent and negligent. Kline opined that the absence of medical records for Snickers was not acceptable under the standard of care.

Further, as the subcommittee noted, respondent testified that he used invoices to function as his medical record for repetitive general health maintenance, and the invoices did not include information about the animals' weight or general health. Additionally, respondent said that many times he makes his notations on the invoices so that the customer will have a record of the treatment, but did not generally keep copies of invoices that he wrote on or make copies of them. Kline believed that the standard of care required that medical records be kept and stated that it was incompetent and negligent not to do so. Again, the findings of the disciplinary subcommittee are supported by competent, material, and substantial evidence. *Risch*, 274 Mich App at 371-372.

Respondent argues that the hearing officer erred when he denied respondent's motion to dismiss because petitioner took longer than one year to discipline him after initiation of an investigation, thereby contravening the language of MCL 333.16237(5), which provides:

> The compliance conference, the hearing before the hearings examiner, and final disciplinary subcommittee action shall be completed within 1 year after the department initiates an investigation under section 16231(2) or (3). The department shall note in its annual report any exceptions to the 1-year requirement.

Here, the disciplinary subcommittee filed an administrative complaint against respondent on December 30, 2003, and his superseding administrative complaint on April 29, 2005. An administrative hearing was held on May 1 and 2, 2007, and the final order of the disciplinary subcommittee was issued on November 10, 2008. It is apparent that the time from investigation to final action was beyond the one-year timeframe delineated in the statute.[3]

Respondent interprets the use of the term "shall" in the first sentence of the statute to indicate that final action must have been taken within one year of the initiation of an investigation. He notes that the legislative bill analysis of the statute reveals that the Legislature intended that disciplinary action would not exceed one year. While the plain language of the statute does establish a one-year timeframe for completing administrative action after the date of initiation of an investigation, it also clearly indicates that where the one-year timeline is violated,

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[3] Statutory interpretation is a question of law subject to de novo review on appeal. *Dep't of Consumer Indus Servs v Shah*, 236 Mich App 381, 387; 600 NW2d 406 (1999). The determination whether a party has been afforded due process is a question of law subject to de novo review. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). The goal of statutory interpretation is to determine and apply the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The first step in determining legislative intent is to examine the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning it plainly expressed. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). Judicial construction is appropriate only when a statute is ambiguous. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006).

the result is a notation in the annual report. The statute does not require dismissal in a situation where the timeframe is violated and provides a sanction of reporting to the Legislature in the annual report. No sanction should be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *People v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007); see also *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007) (observing that courts may not speculate as to the intent of the Legislature beyond the language expressed in the statute).

Respondent asserts that MCL 333.16237(5) employs "shall" language in the portion of the public health code that identifies causes of action, and that the language is nearly identical to a statute of limitations contained in the causes of action of Michigan Compiled Laws, and this proves that the Legislature intended that complaints be dismissed if procedural time requirements are not met. Additionally, respondent argues that the second sentence of MCL 333.16237(5) does not modify the first sentence and merely requires a report of violations of the first sentence. However, the Legislature's inclusion of the requirement to report violations of the statutory timeline demonstrates that the Legislature contemplated that the timeline would be violated, and, as discussed, provided only the report as a sanction for violations that were anticipated.

Additionally, the Public Health Code is to be liberally construed to protect the health, safety, and welfare of the people. MCL 333.1111(2). In *Latreille v Michigan State Bd of Chiropractic Examiners*, 357 Mich 440, 445-446; 98 NW2d 611 (1959), the Court stated that a responsibility to protect the public is a strong argument against applying a general statute of limitations by analogy. In light of a complex and lengthy investigation, it would not be reasonable to dismiss the complaint and it would not serve the public interest.

Respondent cites cases from New Mexico to support his argument. However, Michigan cases have found similar violations of statutory time requirements did not require dismissal. In denying respondent's motion to dismiss, the hearing officer referenced *Dep't of Consumer & Indus Servs v Greenberg*, 231 Mich App 466; 586 NW2d 560 (1998). *Greenberg* considered a board of Optometry Disciplinary Subcommittee violation of MCL 333.16232(3), which states that "[a] disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearings examiner to impose a penalty." *Greenberg*, 231 Mich App at 468. The *Greenberg* Court determined that the time frames set out in the statute are primarily guidelines for the disciplinary system, and that the use of the term "shall" in the statute is permissive language rather than mandatory. *Id*. at 468-469. The *Greenberg* Court reasoned that multiple provisions of the Public Health Code impose time restrictions for disciplinary complaint processing, but none of them impose sanctions for violating these provisions. *Id*. at 469. Further, MCL 333.16241(8)(e) explicitly contemplates that delays in the deadlines will occur. *Id*. Accordingly, *Greenberg* concluded that violation of the time requirement, especially without allegations of prejudice suffered by appellant, did not require dismissal of the complaint. *Id*.[4]

[4] This Court has relied on *Greenberg* in refusing to dismiss other actions that were decided in violation of the time requirements set forth in MCL 333.16232(3). See, e.g., *Bureau of Health* (continued…)

Additionally, in *Greenberg*, 231 Mich App at 469, the Court considered any prejudice suffered by respondent in its analysis of violations of statutory timeframes. Here, respondent does not identify any prejudice that he suffered as a result of the lengthy process. Additionally, in denying respondent's motion to dismiss, the hearing officer noted that the proceedings had been delayed 219 days as of December 27, 2006 because of requests from respondent or the joint requests of the parties. The hearing referee noted the complex and sensitive nature of the case as well as the scheduling difficulties as responsible for the length of this matter.

Respondent contends that not dismissing the complaint against him would constitute a violation of his due process rights because his veterinary license is a valuable property right that cannot be revoked without due process. No person may be deprived of life, liberty or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). "'Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker.'" *Hinky Dinky Supermarket, Inc, v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004) (citation omitted). Due process demands some form of hearing before the deprivation of a property interest. *Brandon Twp v Tomkow*, 211 Mich App 275, 282-283; 535 NW2d 268 (1995). Here, respondent fails to allege that the administrative process did not provide him with adequate notice or an opportunity to be heard. Respondent had a full evidentiary hearing before the hearing referee and was able to fully present his defense to the complaints against him.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly

(…continued)

Professions v Vandermay, unpublished opinion per curiam of the Court of Appeals, issued March 11, 2008 (Docket No. 275617), pp 4-5; *Bd of Pharmacy v Goldstien*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 1999 (Docket No. 200403), p 4. This Court also similarly interpreted violations of the time requirement in MCL 333.16237(5), the statute at issue here, to not require dismissal. See *Dep't of Consumer and Indus Servs v Kelly*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2000 (Docket No. 213602), pp 1-2. While not binding authority, MCR 7.215(C)(1), these unpublished cases evidence the degree to which the reasoning of *Greenberg* permeates this area of the law.